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# In The
# Supreme Court Of The United States

OCTOBER TERM, 1976

No. 76-281

HUB THEATRES, INC., ASPEN REALTY, INC.,
SUFFOLK CONCESSIONS, INC.,
*Appellants*

v.

MASSACHUSETTS PORT AUTHORITY,
*Appellee*

**On Appeal from the Supreme Judicial Court of Massachusetts**

## MOTION TO DISMISS

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The appellee Massachusetts Port Authority moves to dismiss the appeal on the grounds that the Court lacks jurisdiction under 28 U.S.C. § 1257(2), the statute invoked by the appellants (Jur. St. 2), that the appeal does not present a substantial federal question, that the purported federal question presented was not timely or properly raised, that the judgment below rests on an adequate non-federal basis, and that the appeal does not comply with the rules of this Court, particularly Rule 15(1)(d).

The Supreme Judicial Court of Massachusetts affirmed the dismissal of the action on the pleadings by the Massa-

chusetts Superior Court. The plaintiffs had commenced an action in tort against the Massachusetts Port Authority, created by an Enabling Act (Chapter 465 of the Massachusetts Acts of 1956) which directed it, as successor to the state, to maintain and operate Logan Airport, on the ground that flights over the plaintiffs' theatre were the responsibility of the Authority, constituted a nuisance,[1] and entitled the plaintiffs to recover three million dollars from the defendant. The Authority demurred to the writ and declaration and set up the bar of its Enabling Act. R. 4

The appellants say that "[t]he issue in the case from the very outset has been whether or not the state has the power to legislatively sanction . . . a substantial nuisance . . . without the payment of just compensation". Jur. St. 5. The truth of the matter is that they never pitched their damage claim on the Fourteenth Amendment or any other provision of federal law until such a position became a prerequisite of further judicial review. The plaintiffs' declaration (R.1-3) does not rely upon any constitutional provision. The decision of the Superior Court dismissing the

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[1] The opening sentences in the plaintiffs' Supreme Judicial Court (SJC) brief were as follows:

> "It may be properly inferred that the facts set forth in the Plaintiffs' Declaration wherein it is alleged that jet aircraft operating below safe navigable air space over an outdoor theatre, emitting noxious fumes and ear-splitting noise with attendant tremendous vibrations and other undesirable operations, would totally interfere with the exhibition and enjoyment of motion pictures by patrons of said outdoor theatre. Such conduct if proven by the Appellants, would certainly warrant the finding of a nuisance."

The appellee has requested that the clerk of the Supreme Judicial Court forward to this Court the record of the proceedings below and the briefs of the parties. Citations are to those materials.



action on the "clear principle of Massachusetts law that what the Legislature has authorized or directed cannot be a nuisance or trespass" (R.7) does not refer to any issue of whether the federal constitution confers a right to compensation for an alleged "nuisance" of this kind, not amounting to a taking. The appellants' SJC briefs made no such contention, leading the Authority in its brief to observe without contradiction that "[t]he constitutionality of the comprehensive legislation embodying this judgment [that the airport is not a public nuisance but a public benefit] has at all times been affirmed by our courts and is not challenged in this suit." Def. Br. 7-8; compare the plaintiffs' reply brief which takes no exception to this statement. The opinion of the Supreme Judicial Court recognizes no such issue. See Jur. St. 9-13. The plaintiffs' Petition for Rehearing (letter to Hennessey, C. J. of April 28, 1976) makes no claim that the Enabling Act as construed violates the Fourteenth Amendment, but rather maintains that the declaration was sufficient as a matter of state law falling within the exception mentioned in the SJC opinion for unreasonable and unnecessary activities. Coincidentally, the appellants have discovered their Fourteenth Amendment argument just at the point when it is the only argument statutorily reviewable.

The passage in the Authority's SJC brief quoted in the appellants' jurisdictional statement argues the point that even if a nuisance claim might be recognized by state law for permitting noisy overflights, the area of airplane noise had been occupied by federal law, which would preclude a state claim. Def. SJC Br. 14-18. The Supreme Judicial Court never reached this argument. Instead, it rested its decision on the "adequate non-federal basis" that no cause of action for nuisance existed under state law.

The insubstantiality of the contention now made that "[b]lanket immunity such as is urged by the appellee would give the Commonwealth the untrammeled ability to effectively foreclose the appellants' right to compensatory damages pursuant to the Fourteenth Amendment" (Jur. St. 6) is shown by another circumstance. The Superior Court noted the plaintiffs' right to recover damages for an activity "so extreme that it amounts to a taking" and the pendency of the plaintiffs' eminent domain petition for assessment of damages then pending in that court. R.9, 8. The plaintiffs referred to this proceeding in their affidavit filed in the Supreme Judicial Court on behalf of the appellants dated September 30, 1975.[2] The Supreme Judicial Court agreed that the plaintiffs in a proper proceeding could try out the issue of whether the activity complained of amounted to a taking but noted that "we do not have that question before us". Jur. St. 13. Thus, there has never been any question of "blanket" immunity here; it has always been recognized that an interference so major as to amount to a taking is compensable in an eminent domain proceeding, and the appellants have belatedly sought to take advantage of this remedy.

The Fourteenth Amendment does not reach governmental activities not amounting to a taking. See *Transportation Co.* v. *Chicago,* 99 U.S. 635 (1878); *Town of East Haven* v. *Eastern Airlines, Inc.,* 331 F.Supp. 16, *supplemented,* 333 F.Supp. 338 (D. Conn. 1971), *aff'd,* 470 F.2d 148 (2d Cir. 1972). The appellants' declaration did not allege a taking,

[2] "The action previously instituted against the Appellee alleging a constructive taking of the theatre property by the Appellee (Suffolk Superior No. 623529; which case is referred to on page 4 of the lower court's "Memorandum of Decision on Motion to Dismiss") is still pending in the Superior Court." Pl. SJC Aff. 1.



and its writ was in tort. While the Fourteenth Amendment does underlie the appellants' eminent domain position, it is not brought into play by this action of tort. Compare *Crane* v. *Hahlo,* 258 U.S. 142, 147 (1922); *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 610 (1974).

Finally, the absence of any legitimate argument for review available to these appellants is underlined by their resort to extra-record factual assertions which are quite untrue. Conduct of this sort is a tacit admission that if they were to confine themselves to the truth, they could not prevail. This is a case decided on the pleadings . The Court will not find any allegation that "[i]n the latter part of the 1950's, and after the construction of the theatre, a new runway was installed at the airport with a glide path directly over the theatre. The first aircraft to use the new runway were prop jets . . . ." Jur. St. 3-4; contrast R.1-3. Instead, one finds that the actual allegation is:

> "That the Defendant, Massachusetts Port Authority, maintained and presently maintains its runways of varying lengths. Several of these runways were and are aimed at and point directly to the said Suffolk Downs Drive-in Theatre, and the glide paths to said runways are directly over the theatre." R.2 (Declaration, Count 1).

The plaintiffs' allegation that the runways *"were* and are aimed at" the theatre is basically truthful and is accepted arguendo on demurrer. The assertion of a *"new* runway" installed *"after* the construction of the theatre" not only lacks foundation in the record, but is purely fictional. The truth of the matter is that although there is indeed an airport runway (4R-22L) which is "aimed at and point[s] directly to" the plaintiffs' theatre, it was constructed in the 1940's. From the time of its construction to date there has been no change in its length or direction. The plaintiff-

appellants in 1955 deliberately located and built their open-air theatre squarely in the approach path of this runway, then Logan's longest and principal runway. This was a year before the creation of the Authority. The plaintiffs' attempt to avoid their share of responsibility for the overflights by misstating the chronology of events is quite unconscionable.

For all of the above reasons, appellees' motion to dismiss should be granted.

Respectfully submitted,

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September 24, 1976